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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

E035137

(Super.Ct.No. J167112)

OPINION

APPEAL from the Superior Court of San Bernardino County. Raymond L.
Haight, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and
Appellant.

Ronald D. Reitz, County Counsel, and Ramona E. Verduzco, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Minor.

J.M. (father), the father of A.M. (child), who is presently four and one half years old, appeals from orders made at a selection and implementation hearing terminating his parental rights and finding adoption most the most appropriate plan. (Welf. & Inst. Code, § 366.26.)¹ The child's mother is not a party to this appeal. On appeal father contends that the sibling relationship between the child and her now seven-year-old half brother by a different mother is so strong that the court erred in terminating his rights and not ordering an alternate plan for his daughter. (§ 366.26, subd. (c)(1)(E).) We disagree and affirm the judgment.

PROCEDURAL HISTORY AND FACTS

This is the third appeal in this case. We take judicial notice of the records of the prior appeals.

The first appeal was taken by the San Bernardino County Department of Children's Services (DCS) from a dispositional order removing the child from the home of her maternal aunt and placing her in the custody of the paternal grandmother. With one dissenting opinion we affirmed the judgment. (Case No. E031513.)

After the judgment was affirmed, the paternal grandmother appealed from a later order granting a changed circumstances petition (§ 388) which placed the child back with

¹ All further statutory references are to this code unless otherwise stated.

the maternal aunt after problems arose concerning paternal grandmother's unwillingness to cooperate with the court ordered visitation with the maternal aunt and child's half siblings by a different father. We affirmed the court's order changing placement. (Case No. E034400.)

Originally, the child was removed from the custody of her mother and father when at four months of age the child was diagnosed with failure to thrive. Eventually, she was returned to her parents under supervision of the court.

In August 2001, another petition was filed, and the child and her two half sisters were removed from the family home due to father's admitted sexual molestation of one of the sisters. Father was criminally prosecuted and is presently in state prison.

Prior to the dispositional hearing on the new petition, the maternal aunt had custody of the child. The paternal grandmother filed a section 388 petition prior to the dispositional hearing seeking custody of the child. The social worker assigned to the case recommended against the change in placement, stating her belief that the paternal grandmother was sabotaging the child's placement with her aunt. Despite that assessment, the court's dispositional order granted the change in placement. The child, who had been living with her aunt and two half sisters for the previous six months, went to live with the paternal grandmother and her older half brother by a different mother. As noted above, this change of placement order was upheld on appeal with one dissenting opinion.

During the first 13 months of the dependency, the child was with the paternal grandmother and her then five-year-old half brother.² She was then returned to her parents for the next six months when the second petition was filed due to father's sexual molestation of her sister. After a temporary placement with a nonrelative, the child spent the next six months with her aunt and sisters until the court ordered a change of placement back to the paternal grandmother. As noted above, there was a later change of placement back to the maternal aunt's home where the child has since continuously lived with her two older half sisters.

On January 20, 2004, the court held the contested section 366.26 hearing. The social worker testified that the child had been placed with the paternal grandmother in August 2002 where she stayed for about the next 17 months living with her half brother. The social worker opined that the child and her brother had a brother-sister relationship. When the child had been placed back with the parents, there had been infrequent visitation between the child and the half brother who was living with the paternal grandmother.

After the child was placed back with the maternal aunt, due to visitation problems created by the paternal grandmother, she enjoyed frequent visitation with her brother. The maternal aunt indicated a willingness to continue visitation after the termination of parental rights. The social worker opined that despite the visitation problems that

² The paternal grandmother has since been appointed the legal guardian of the boy.

occurred in the past caused by the paternal grandmother, the aunt would continue to ensure visitation between the child and her half brother.

The social worker testified that the relationship between the child and her brother should be continued but that it was not strong enough to qualify as a sibling exception to adoption under section 366.26, subdivision (c)(1)(E). The half brother had not lived with the child until she was placed by court order with the paternal grandmother. The child had not acted out when removed from the grandmother and half brother's home. The record shows that the child's relationship with her older half sisters, with whom she now lives, is just as strong, if not stronger, than the one she enjoys with her brother.

DISCUSSION

Section 366.26, subdivision (c)(1)(E), provides an exception to termination of parental rights if the court finds there would be a substantial interference with a child's sibling relationship taking into consideration whether the child has been raised in the same home with a sibling, whether the child has shared significant common experiences or has an existing close and strong bond with a sibling. These considerations are weighed against the benefits a child would receive by adoption. Under this exception the juvenile court must consider the possible detriment adoption would cause to the interruption of the sibling relationship but not whether the adoption would be detrimental to the sibling. (*In re Celine R.* (2003) 31 Cal.4th 45, 53-54.)

When, as here, a court determines that a child is likely to be adopted, adoption is the preferred plan. The court must terminate parental rights and order a child placed for adoption unless one of the exceptions to adoption applies. (*In re Celine R.*, *supra*, 31

Cal.4th at p. 49; § 366.26, subd. (c)(1)(A)-(E).) The parent opposing termination has the burden of proof establishing the exception applies. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1017.)

Father failed to meet his burden below. We review the court's judgment for substantial evidence. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) We find substantial evidence supports the court's judgment.

For purpose of discussion we will assume, without deciding, that there is a substantial sibling relationship and strong bond between the child and her half brother. The nature of the relationship, however, does not outweigh the benefits the child will receive from the legal permanence provided through adoption. Nor will termination of parental rights be detrimental to the child. (§ 366.26, subd. (c)(1)(E); *In re L.Y.L., supra*, 101 Cal.App.4th at pp. 951-952.)

At the time of the section 366.26 hearing, the child was no longer living with her half brother in the paternal grandmother's home. She was living with her aunt, who wishes to adopt her, and her older half sisters with whom she also enjoys a substantial sibling relationship and strong bond. Her relationship with her brother has been maintained by frequent visitation provided by her aunt. In her early life, the older half brother did not live in the same home with the child and her parents.

The aunt has expressed a willingness to continue the child's relationship with the older half brother after adoption through frequent visitation. In effect, since the children do not live together, there will be no change in the relationship since its continuation is based on frequent visitation regardless of whether the permanent plan is adoption,

guardianship or foster care. Given the fact that these two children will probably never be living under the same roof, we cannot find that the child will suffer a substantial interference with her relationship with her half brother as long visitation continues postadoption, and adoption will provide the permanence that guardianship or long term foster care will not. (*In re L.Y.L., supra*, 101 Cal.App.4th at pp. 952-953.)

Father has not shown detriment to the child by termination of parental rights and adoption or that there will be a substantial interference in the sibling relationship. (*In re Jacob S., supra*, 104 Cal.App.4th at p. 1019.)

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
Acting P.J.

We concur:

/s/ Ward
J.

/s/ King
J.